



January 27, 2000

Ms. Ruth H. Soucy  
Manager, Open Records  
Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2000-0272

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 131055.

The Comptroller of Public Accounts (the "Comptroller") received a request for all records relating to electronic mail originated and received by a specific former employee of the Comptroller. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, and 552.117 of the Government Code as well as sections 111.006 and 151.027 of the Tax Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the information at issue.<sup>1</sup>

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We begin our analysis with Enclosures 1-7.<sup>2</sup> You contend that these documents are excepted under section 552.107(1) of the Government Code. Section 552.107(1) of the Government Code excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney's legal opinion or advice. Open Records Decision No. 574 at 3 (1990). In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We agree that much of the information contained in Enclosures 1-7 is excepted under section 552.107(1). Therefore, the Comptroller may withhold the information contained in Enclosures 1-7 under section 552.107(1) in accordance with our markings.

Next, we turn to Enclosures 8-10. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 4-5 (1990). We agree that the much of the information contained in Enclosures 8-10 is excepted under section 552.111. Accordingly, the Comptroller may withhold the information in accordance with our markings.

Next, we consider Enclosure 11. Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government

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<sup>2</sup>You have divided the submitted documents into separate enclosures, each beginning with a cover sheet explaining the exceptions that you believe apply. For clarity, we have numbered those enclosures and refer to them according to their designated numbers.

Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Enclosure 11 contains family member information regarding an employee of the Comptroller. Therefore, if the employee elected for confidentiality under section 552.024 prior to the date on which the request for this information was made, then under section 552.117, the Comptroller must withhold the marked family member information.

In regard to the responsive documents contained in Enclosure 12, you contend that they are excepted under section 552.103 of the Government Code. Section 552.103(a) excepts from required public disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated at the time of the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990); Gov't Code § 552.103. The Comptroller must meet both prongs of this test for information to be excepted under section 552.103.

You explain that the Comptroller is currently involved in pending litigation. In support of this assertion, you have submitted the Plaintiff's First Amended Original Petition in *McLane Co. Inc. v. Carole Keeton Rylander, et al.* No. 99-00979 (345<sup>th</sup> Dist. Ct., Travis County, Tex. dated Aug. 18, 1999) and an order from *City of Cedar Park v. Capital Metropolitan Transportation Authority, et al.* No. 99-180-C26 (26<sup>th</sup> Dist. Ct., Williamson County, Tex. filed May 14, 1999). We find that you have shown that litigation involving the Comptroller is pending. Moreover, we agree that the responsive documents contained in Enclosure 12 are related to the litigation. Thus, the Comptroller may withhold the responsive documents contained in Enclosure 12 from disclosure under section 552.103.

In reaching this conclusion, however, we assume that the opposing parties in the pending litigation have not previously had access to the documents at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no interest under section 552.103 exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we turn to Enclosure 13 which you contend is excepted under section 552.108. Section 552.108(a)(1) provides that information held by a law enforcement agency that deals with the detection, investigation, or prosecution of crime is excepted from required public

disclosure if release of the information would interfere with the detection, investigation, or prosecution of crime. The Comptroller is a law enforcement agency for purposes of administering the Tax Code. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 678-679 (Tex. 1995). In *A&T Consultants*, the court agreed that the Comptroller uses audits to further the Comptroller's law enforcement objectives.

Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a), (b), .301(b)(1); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You explain that the electronic correspondence contained in Enclosure 13 pertains to a pending audit. Based on this representation, we find that release of the correspondence "would interfere with the detection, investigation, or prosecution of crime." Therefore, the Comptroller may withhold the correspondence contained in Enclosure 13 under section 552.108(a)(1).

In regard to the documents contained in Enclosure 14, you contend that they are excepted under a "special circumstances" test. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Accordingly, section 552.101 information considered confidential under the common law right to privacy. Information is protected by the common law right to privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.101 also incorporates the constitutional right to privacy. The United States Constitution protects two kinds of individual privacy interests. The first interest is an individual's interest in independently making certain important personal decisions about matters that the United States Supreme Court has stated are within the "zones of privacy," as described in *Roe v. Wade*, 410 U.S. 113 (1976) and *Paul v. Davis*, 424 U.S. 693 (1976). The "zones of privacy" implicated in the individual's interest in independently making certain kinds of decisions include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. The second individual privacy interest that implicates constitutional privacy involves matters outside the zones of privacy. To determine whether the constitutional right to privacy applies, this office applies a balancing test, weighing the individual's interest in privacy against the public right to know the information. See Open Records Decision No. 455 at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5<sup>th</sup> Cir. 1985)).

Accordingly, under section 552.101 in conjunction with common law and constitutional privacy, information may be withheld from public disclosure in special circumstances. See Open Records Decision No. 169 (1977). We consider "special circumstances" to refer to a

very narrow set of situations, although we have held that it includes situations in which release of the information would likely cause someone to face “an imminent threat of physical danger.” Open Records Decision No. 169 at 6 (1997). “Special circumstances” does not include “a generalized and speculative fear of harassment or retribution.” Open Records No. 169 at 6 (1977). We have reviewed the documents contained in Enclosure 14 and considered your stated concerns for the safety of certain public employees. You assert that release of the documents could pose a security risk to public employees who work in the building. We do not consider this information to be the type that, if released, would cause an imminent threat of physical danger. Therefore, we do not find that special circumstances exist here to make the information contained in Enclosure 14 confidential under section 552.101.

You also argue that the documents in Enclosure 14 are excepted under section 552.108. However, the Comptroller is a law enforcement agency only for the purposes of administering the Tax Code. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 678-679 (Tex. 1995). Because the documents in Enclosure 14 do not concern the Comptroller’s administering the Tax Code, the documents are not excepted under section 552.108.

However, we find that portions of the information contained in Enclosure 14 are excepted from required public disclosure. Some of the information is confidential under section 552.101 in conjunction with common law privacy. Moreover, an electronic correspondence is excepted under section 552.107(1). Therefore, while the Comptroller must release most of the information contained in Enclosure 14, it must withhold the information that we have marked as excepted under section 552.101 in conjunction with common law privacy, and it may withhold the information that we have marked as excepted under section 552.107(1).

Finally, we consider the documents submitted in Enclosure 15. Section 552.101 encompasses confidentiality provisions such as section 111.006(a)(2) of the Tax Code. Section 111.006(a)(2) provides that information “secured, derived, or obtained by the Comptroller or the attorney general during the course of an examination of the taxpayer’s books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer” is confidential. Tax Code § 111.006(a)(2).<sup>3</sup> We agree that much of the information contained in Enclosure 15 is confidential under section 111.006(a)(2). We have marked the information that you must withhold pursuant to section 111.006(a)(2), as encompassed by section 552.101 of the Government Code. In addition, we find that other information contained in Enclosure 15 is excepted under section 552.107(1) of the Government Code as it contains communications in which the Comptroller’s attorneys rendered legal advice or

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<sup>3</sup>Chapter 151 of the Tax Code, which pertains to sales, excise, and use tax, also has a similar confidentiality provision. *See* Tax Code § 151.027(b). Thus, the information made confidential under section 151.027 is co-extensive with information deemed confidential under section 111.006.

opinions on behalf of their client. We have marked the information in Enclosure 15 that the Comptroller may withhold under section 552.107. You must release the remaining information in Enclosure 15.<sup>4</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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<sup>4</sup>You argue that the information in Enclosure 15 is excepted from disclosure under section 552.107 as an attorney's legal advice or opinion. However, you have not identified who the parties named in the documents and the communications are. Therefore, we have no basis for concluding that all of the information is excepted under section 552.107(1).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "E. Joanna Fitzgerald". The signature is written in a cursive, flowing style.

E. Joanna Fitzgerald  
Assistant Attorney General  
Open Records Division

EJF/nc

Ref: ID# 131055

Encl. Submitted documents

cc: Ms. Sherry Boyles  
Executive Director  
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(w/o enclosures)